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In The

Supreme Court of the United States

October Term, 1979

No. 79-300

APPEAL NO. 1

INSPIRATION ENTERPRISES, INC., EDWINA RAGER and EDWARD RAGER,

Petitioners,

vs.

INLAND CREDIT CORPORATION, ARDISCO FINANCIAL CORPORATION, STANLEY E. STERN, OSCAR DANE and HAROLD GREENSTEIN,

Respondents,

(Continued on Reverse)

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INLAND CREDIT CORPORATION,

Respondent,

vs.

EDWINA RAGER,

Petitioner.

Action No. 1

APPEAL NO. 2

INLAND CREDIT CORPORATION,

Respondent,

vs.

INSPIRATION ENTERPRISES, INC., EDWINA RAGER and EDWARD RAGER,

Petitioners.

Action No. 2

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Petitioners.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Did the exercise by a trial judge of his inherent power to dismiss a complaint on the merits for petitioners' failure to proceed to trial when ordered to do so, violate petitioners' right to due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Did the procedure adopted in this case by the New York courts respecting petitioners' allegations of bias and prejudice on the part of the trial justice violate petitioners' right to due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States?

STATEMENT OF THE CASE

This petition seeks a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, First Department, where Inspiration Enterprises, Inc. ("Inspiration"), Edward Rager and Edwina Rager (hereinafter collectively referred to as "petitioners") had appealed from a judgment of

the Supreme Court, New York County. That judgment dismissed, on the merits, petitioners' complaint which had sought to vacate a judgment of foreclosure and sale dated October 28th, 1975 (hereinafter the "Inspiration Action"). The basis of the dismissal was petitioners' long history of delay in prosecuting the Inspiration Action and the fact that they refused to go to trial on June 15, 1978, although specifically ordered to do so by the trial court. That judgment was affirmed by the Appellate Division by order dated August 24th, 1979, and on July 10, 1979, the New York Court of Appeals denied petitioners' motion for leave to appeal to that court.

The Inspiration Action involves commercial real property located at 16 East 65th Street, New York, New York ("premises"), consisting of a townhouse containing several apartment dwelling units, which respondent Inland Credit Corporation ("Inland") acquired on December 11, 1975 after judicial sale pursuant to the judgment of foreclosure sought to be vacated by the Inspiration Action. Prior to that foreclosure, the premises had been owned by Inspiration, a corporation of which petitioners Edward Rager, an attorney, and Edwina Rager, his wife, were the principal stockholders, directors and officers. The foreclosure was instituted by reason of Inspiration's failure to pay installments due under Inland's mortgage, under a first mortgage covering the premises, and real estate taxes.[1]

As noted, Inland acquired title to the premises on December 11, 1975. On February 19, 1976, Mrs. Rager, who was then the sole remaining tenant, was served with a notice to quit, and on March 8, 1976, a summary dispossess was commenced in the New York City Civil Court, New York County, to evict her. The next day, Inspiration and the Ragers commenced the Inspiration Action in the Supreme Court, New York County.

On March 15, 1975, petitioners made a motion in the

1. Petitioners had defaulted in the foreclosure action, although given due notice.

Supreme Court to consolidate that summary dispossess proceeding with the Inspiration Action, simultaneously requesting a stay to prevent Inland from proceeding with the dispossess and from disposing of the premises. Before any decision had been made by Mr. Justice Tyler, the Justice to whom the motion had been referred, petitioners made yet another motion to consolidate the Inspiration Action with an action pending in Suffolk County. On May 5, 1976, Mr. Justice Tyler ordered consolidation of the two New York County actions,[2] and *an immediate trial* in view of the fact that the summary dispossess proceeding had now been consolidated with a plenary action.

However, because the court had made no decision respecting the consolidation of the Inspiration Action with the Suffolk action, petitioners had an opportunity to delay that immediate trial. They forthwith brought a motion by order to show cause, to restrain any activity in the Inspiration Action, including trial, until their motion to consolidate the Inspiration Action with the Suffolk action had been decided. On May 27, 1976, the New York County Supreme Court (Baer, J.) denied the motion to consolidate the Inspiration and Suffolk actions. Petitioners, by order to show cause containing a temporary restraining order preventing trial, immediately brought on a motion before Mr. Justice Baer, to reargue and on June 9, 1976, while that motion to reargue was still pending,[3] brought another motion in the Appellate Division, First Department, to stay trial of the Inspiration Action until the appeal from Mr. Justice Baer's May 27th order had been decided, a motion which was not decided until July 29, 1976 when the Appellate Division denied petitioners' motion for a stay. On August 27, 1976 an

2. "Inspiration Action" will hereinafter include the Civil Court summary dispossess unless otherwise noted. The motion to further consolidate the Suffolk Action with the inspiration action was a separate motion and was not pending before Mr. Justice Tyler but before Mr. Justice Harold Baer.

3. That motion was denied on June 17, 1976.

order incorporating Mr. Justice Tyler's decision was noticed for settlement and then entered on September 21, 1976, which by its terms, set the matter down for trial on the equity day calendar in the New York County Supreme Court for September 30, 1976.

But petitioners were not about to go to trial. They requested and received a conference with Mr. Justice Tyler on September 27th, 1976. They asked that he change his order to provide for petitioners' right to disclosure and for a jury. Petitioners were told by Mr. Justice Tyler that he would not change his order and he directed them to apply to the trial judge for leave to take depositions, and for a jury, if appropriate.

The Inspiration Action was then assigned to New York City Civil Court Judge Irving Smith, sitting as a Supeme Court Justice in Trial Term Part 16. Mr. Justice Smith called the case for a pre-trial conference on October 21, 1976, at which time he set the matter down for trial without jury on November 10, 1976. He clearly stated to petitioners that if they objected to proceeding to trial without a jury, their appropriate remedy was a formal motion for a jury, at trial and on the record.

But, these petitioners were absolutely determined that there would never be a trial of the Inspiration Action. On November 1, 1976, they brought a proceeding pursuant to Article 78, New York Civil Practice Law and Rules in the Appellate Division *against Mr. Justice Smith,* seeking an order in the nature of a writ of prohibition, preventing him from conducting a trial of the action without a jury. Although requested by motion upon service of the petition, the Appellate Division refused an interim stay of the trial.

However, petitioners got yet another opportunity to prevent the November 10th trial of the action. On November 9, 1976, just one day before the scheduled trial date, the Appellate Division *affirmed* Mr. Justice Baer's order denying consolidation of the Inspiration and Suffolk actions. On that

same day, petitioners moved in the Appellate Division for a stay of the November 10th trial, pending the hearing and determination of their simultaneous motion for leave to appeal that affirmance to the New York Court of Appeals. Although no interim stay was granted by the court, Mr. Justice Smith, when advised of petitioners' motion in the Appellate Division for a stay, *sua sponte*, adjourned the trial of the matter to November 15, 1976. On November 11, 1976, petitioners made yet another motion in the Appellate Division for a stay of the trial (the first had not been decided), and upon application, Mr. Justice Nunez of the Appellate Division did grant an interim stay of the November 15th trial. Thus, based upon an *affirmance* of Mr. Justice Baer's order denying consolidation of the Inspiration and Suffolk actions, on November 11, 1976, there were two motions for a stay of trial simultaneously pending before the Appellate Division, together with an Article 78 proceeding pending there against Mr. Justice Smith. On November 15, 1976, Mr. Justice Smith was left with no alternative but to adjourn the trial to December 7, 1976, by which time he anticipated that all of the petitioners' machinations to avoid trial would be resolved. However, such was not to be the case.

On November 18, 1976, the Appellate Division dismissed the Article 78 proceeding. Undaunted, on December 2, 1976, petitioners brought yet another Article 78 proceeding against Mr. Justice Smith, now requesting an order in the nature of a writ of mandamus, instead of prohibition. Although no interim stay of the December 7th trial was granted by the Appellate Division, luck again smiled upon petitioners. On that same day, December 2nd, 1976, the Appellate Division granted leave to petitioners to appeal its affirmance of Mr. Justice Baer's order to the New York Court of Appeals, and predictably, on December 6, 1976, one day before the trial was to have started, petitioners moved Judge Fuchsburg of the New York Court of Appeals for an interim stay of that trial, which was granted. Thus, on December 7, 1976, the fourth time the matter had been set down for trial, Mr. Justice Smith was again required to adjourn the

case, which he did to January 5, 1977. However, because he would then no longer be sitting as a Supreme Court Justice, the matter was thereafter assigned to Individual Calendar Part I of the Supreme Court, Mr. Justice Martin Evans presiding. Throughout all of these proceedings, which had then taken nearly a year, Mrs. Rager had remained in possession of the premises without payment of one penny of rent to Inland, or of mortgage installments or real property taxes both of which were being paid by Inland.

On December 16, 1976, the Court of Appeals, *sua sponte*, dismissed the appeal respecting the consolidation of the Inspiration and Suffolk actions. In order to be absolutely certain that the case would not be tried on January 5th, 1977, or at any time thereafter, the petitioners then did the following things:

(a) On December 28, 1976, brought on an order to show cause in the Court of Appeals for a stay of the trial based upon yet another appeal involving the consolidation. No interim stay was signed.

(b) On the same day, made a motion for leave to appeal to the Court of Appeals from the Appellate Division's denial of the Article 78 proceeding against Mr. Justice Smith, notwithstanding the fact that Mr. Justice Smith was no longer connected with the matter. No interim stay was signed.

(c) On January 4th, 1977, made a motion before Mr. Justice Evans, returnable January 17th, 1977 to vacate the purported order of Mr. Justice Smith striking petitioners' jury demand.

(d) On the same day, served notices to take the depositions of all respondents on various days, commencing January 18, 1977 through January 25, 1977.

On January 5th, 1977, the parties appeared before Mr. Justice Evans who adjourned the matter until January 17th,

1977, and granted to petitioners the right to depose the President of Inland which deposition was taken on January 11, 1977.

On January 17, 1977, the parties again appeared before Mr. Justice Evans. To avoid further delay by petitioners through motions to the Court of Appeals, respondents had consented to a consolidation before Mr. Justice Evans of the Suffolk action. Based upon that consent, Mr. Justice Evans drafted an order providing for that consolidation but petitioners objected to the form of the order as so drafted. Accordingly, Mr. Justice Evans, *sua sponte,* and in the exercise of his discretion, refused to consolidate the Inspiration and Suffolk actions (1a - 2a, January 17, 1977, Appendix A).[4]

The next day, January 18th, 1977, the parties again appeared before the court. The petitioners then requested an examination before trial of respondents Dane and Greenstein which the court granted. On that same day, Mr. Justice Evans denied petitioners' motion to restore their jury demand and set the matter down for trial on January 21, 1977 (3a, January 18, 1977, Appendix B).

On January 20, 1977, the depositions of respondents Dane and Greenstein were taken.

On January 21, 1977, petitioners requested and were granted an adjournment of trial, peremptorily, to May 9th, 1977, with no provision made for payment to Inland by Mrs. Rager for reasonable use and occupation of the premises. On that same day, the petitioners moved Mr. Justice Evans for further depositions of respondents Dane and Greenstein, stating to the court that such depositions were absolutely necessary for the proper preparation of their case. On February 11, 1977, Mr. Justice Evans granted that motion, but those depositions were never taken because they were never again requested by petitioners of respondents.

4. References are to pages of the transcript on the date indicated.

On May 9, 1977, although they had received more than a three months' adjournment and the matter had been marked peremptorily, petitioners' counsel appeared solely to obtain another adjournment of trial. On their application for adjournment, they:

(a) stated that Mr. Justice Evan's decision respecting petitioners' right to a jury trial was presently pending before the Appellate Division. Mr. Justice Evans asked whether or not an application to the Appellate Division for a stay of the trial had been made pending the hearing and determination of that appeal. Appellants told him that no such motion had been made (4a, May 9, 1977, Appendix C).

(b) claimed that Mrs. Rager had suffered a "paralytic stroke" and in substantiation of that claim, submitted a letter from a doctor in which no such statement was made. At the time, Mrs. Rager was in court and appeared physically able to go to trial (5a-6a, May 9, 1977, Appendix D);

(c) produced a long and involved document from Mr. Rager in Canada, which, in substance, requested an adjournment for a period of seven months (7a, May 9, 1977, Appendix E).

Mr. Justice Evans refused to be moved by any of these delaying tactics employed by petitioners, and ordered them to go to trial. Petitioners' counsel then, in desperation, stated to the court that Mrs. Rager would not be in court that afternoon, and accordingly, would not go to trial. At two o'clock that afternoon, the summary dispossess proceeded, with Mrs. Rager's counsel present in court, but not participating, and upon presentation of the proof, Mr. Justice Evans dismissed the complaint and granted a final judgment of possession to the respondents, ordering a warrant of eviction to issue with a ten day stay of execution (8a, May 9, 1977, Appendix F).

On May 12, 1977, three days later, petitioners made a motion in the Appellate Division for a stay of all proceedings in

the Inspiration Action pending the determination of the appeal respecting their right to a jury trial. On May 19, 1977, that motion was granted, and the appeal was decided. The Appellate Division held that Mr. Justice Evans had been absolutely correct in finding that petitioners were not entitled to a jury trial in their action to set aside the judgment of foreclosure and sale and for damages. However, the decision stated that petitioners were, in fact, entitled to a jury in the summary dispossess proceeding and to that extent, modified Mr. Justice Evans' decision and order.

On May 31st, 1977 petitioners made a motion to Mr. Justice Evans, by order to show cause, to set aside and vacate their default of May 9, 1977. On or about June 15, 1977, Mr. Justice Evans granted the motion to open the default and further granted an adjournment to Mrs. Rager of the trial until October 15, 1977, based upon her representations regarding her health, *provided she pay into court, commencing June 20, 1977, and on the 20th of each month thereafter, the sum of $2,000* (9a-11a, June 15, 1977, Appendix G).

Mrs. Rager paid the $2,000 for the months of June, July and August, 1977, and thereafter, in total disregard of the court's order, discontinued making any further payments. In October of 1977, respondents' counsel cont. ed Mr. Justice Evans' law secretary, and was then told that there were more than 400 matters ahead of the Inspiration Action and that it would not be possible to obtain a trial until the Spring of 1978. In December of 1977, respondents, by letter, demanded an immediate trial pursuant to Mr. Justice Evans' order of June, 1977. Again, respondents' attorneys were advised that the case could not be reached for trial until the Spring of 1978.

Because of the difficulty in obtaining a trial, respondents then made a motion for summary judgment in the Inspiration Action.

On June 12, 1978, the parties appeared before Mr. Justice Evans, who then stated that he would not entertain the motion

for summary judgment, but instead would try the case. But, Mrs. Rager, who had now been living rent free (except for the $6,000 paid into court) since December of 1975, was obviously not going to go to trial. Her attorney requested an adjournment again based upon Mrs. Rager's health. Mr. Justice Evans inquired if Mrs. Rager were confined to a hospital or at home (p. 4, June 12, 1978, Appendix H) and was advised that she was fully ambulatory and able to come to court (12a, June 12th, 1978, Appendix H; 13a, June 15, 1978, Appendix I). *Nevertheless, because of her purported health problems, Mr. Justice Evans offered to have her testimony taken by deposition* (14a, June 12, 1978, Appendix J). The offer was ignored. In yet another effort to avoid trial, for the very first time, petitioners then stated that they wished to bring in new trial counsel. That request was denied by the court (15a, June 12, 1978, Appendix K). The court set June 15th, 1978, as the trial date and stated the equity action would be tried first.

On June 15, 1978, counsel for petitioners appeared, solely to apply for an adjournment of the trial until after Labor Day, despite the direction of the court. The grounds for this application were (a) again, Mrs. Rager's health (13a, June 15, 1978, Appendix I); (b) the new trial counsel (who had no standing in the case) had not had an opportunity to adequately prepare for the case, (16a, June 15, 1978, Appendix L); and (c) there had not been full compliance by respondents with the disclosure provisions of the New York Civil Practice Law and Rules (17a, June 15, 1978, Appendix M) although appellants had not even used the disclosure granted to them. The court heard argument on all grounds for an adjournment and denied the application, noting that the matter had been on the calendar for more than a year and had been noticed and called for trial on numerous occasions, and further noting that all depositions had been taken in January, 1977, and no application of any kind had been made to the court for any relief respecting disclosure (18a, June 15, 1978, Appendix N). When petitioners refused to proceed, the court severed the summary dispossess

proceeding, and dismissed the complaint in the Inspiration Action on the merits and with prejudice (19a, June 15, 1978, Appendix O). Judgment was entered on July 17, 1978. That judgment was affirmed by the Appellate Division without opinion by order dated April 24, 1979 (Pet. Appendix C). On July 10th, the New York Court of Appeals denied petitioners' motion for leave to appeal (Pet. Appendix E).

REASONS FOR DENYING THE WRIT

I.

The dismissal of petitioner's cause of action, with prejudice, was a proper exercise of the trial court's discretion and did not violate petitioners' right to due process.

All that due process requires is that a party be given a meaningful *opportunity* to be heard after having received adequate notice. *Boddie v. Connecticut,* 401 U.S. 371, 377 (1971). Thus, it has long been recognized that a court may, upon a party's deliberate failure to prosecute, dismiss a cause of action with prejudice. Such inherent power in a court is necessary to the orderly and efficient adjudication of cases before it. As long ago as 1876, in *Windsor v. McVeigh,* 93 U.S. 274, 278 (1876) this Court stated as follows:

> "The period within which the appearance must be made and the right to be heard exercised, is, of course, a matter of regulation, depending either upon positive law, or the rules or orders of the court, or the established practice in such cases. And if the appearance be not made, *and the right to be heard be not exercised,* within the period thus prescribed, the default of the party prosecuted, or possible claimants of the property, may, of course, be entered . . ." (Emphasis added.)

In *Link v. Wabash Railroad Company,* 370 U.S. 626 (1962), *rehearing denied,* 371 U.S. 873 (1962) the Court stated:

> "The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts. . . . It has been expressly recognized in Federal Rules of Civil Procedure 41(b), which provides, in pertinent part:
>
> '(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.'
>
> * * *
>
> The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power', governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. That it has long gone unquestioned is apparent not only from the many state court decisions sustaining such dismissals, but even

> from language in this Court's opinion in *Redfield v. Ystalyfere Iron Co.*, 110 U.S. 174, 176, 3 S. Ct. 570, 28 L. Ed. 109. It also has the sanction of wide usage among the District Courts." *Id.* at 629-631.

As the Court explained in *Hammond Packing Co. v. Arkansas,* 212 U.S. 322, 351 (1909), the authority of a court to dismiss a cause of action which is negligently prosecuted (and, *a fortiori,* deliberately not prosecuted), is based upon a presumption that the party, by refusing to prosecute his case, admits its invalidity. It is thus clear that under such circumstances, the party whose cause of action is dismissed cannot claim the deprivation of his right to due process of law. As noted, the constitutional guarantee of due process grants to plaintiff a meaningful opportunity to be heard. However, it in no way entitles him to a full hearing regardless of how negligently or unreasonably he delays in pressing his complaint. *Boddie v. Connecticut,* 401 U.S. 371, 377 (1971).

Rule 41(b) of the Federal Rules of Civil Procedure, as pointed out by the Court in *Link v. Wabash Railroad Company, supra,* gives statutory expression to the Court's long recognized inherent power to dismiss an action on its merits under appropriate circumstances. This Court has considered Rule 41(b) on many occasions and, while emphasizing the need to be circumspect in its use, has never denied its essential validity under the due process clause.

Section 3216(a) of the New York Civil Practice Law and Rules (McKinney), the New York State counterpart of Rule 41(b), provides as follows:

> "(a) Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosection thereof against any party who may be liable to a separate judgment, or

> unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits."

In view of the fact that this Court has recognized the right to dismiss on the merits as an inherent power of courts and that it has upheld the validity of Rule 41(b), clearly CPLR 3216(a), again, a statutory expression of a court's inherent powers, does not violate the due process clause of the Constitution, a conclusion supported by the fact that, when requested, this Court has consistently refused to review the validity of CPLR 3216. *Cataldo v. Burglass,* 51 App. Div. 2d 717, 379 N.Y.S. 2d 154 (2nd Dept. 1976), *app. dismissed,* 39 N.Y. 2d 807 (1977), *cert. denied,* 429 U.S. 1095 (1977); *Witz v. Renner Realty Corp.,* 47 App. Div. 2d 622, 364 N.Y.S. 2d 529 (1st Dept. 1975), *app. dismissed,* 429 U.S. 802 (1976).

Thus, the only question now before this Court is whether the record here demonstrates that the trial court so abused its discretion in finding petitioners to have been unreasonably and indeed, deliberately, neglectful in prosecuting their case, that petitioners' constitutional rights have been violated. As the Court stated in *Link v. Wabash Railroad Company, supra,* in connection with the trial court's order of dismissal under Rule 41(b):

> "Whether such an order can stand on appeal depends not on power but on whether it was within the permissible range of the court's discretion." 37 U.S. at 633.

See Taub v. Hale, 355 F.2d 201, 202 (2nd Cir. 1966), *cert. denied,* 384 U.S. 1007 (1966), *rehearing denied,* 385 U.S. 924 (1966) (applying Rule 41(b)), (". . . such dismissal is largely a

matter of the judge's discretion."); *Edmond v. Moore-McCormack Lines, Inc.*, 253 F.2d 143, 144 (2nd Cir. 1958), *cert. denied*, 358 U.S. 848 (1958), ("Whether the failure to prosecute was such as to warrant an involuntary dismissal under F.R.C.P. Rule 41(b) . . . was a question lying within the discretion of the court."); *Redac Project 6426, Inc. v. Allstate Insurance Company*, 412 F.2d 1043, 1046 (2nd Cir. 1969), ("It is well settled that neither a dismissal with prejudice for failure to prosecute nor a refusal to vacate such a judgment will be reversed on appeal except for abuse of discretion." *Citing Link v. Wabash Railroad Company, supra*); *Milligan v. Hycel Realty Corp.*, 14 N.Y. 2d 581 (1964), (appeal of dismissal order dismissed on grounds that appeal involved a pure question of discretion not reviewable by the Court of Appeals).

In the instant case, the record in the trial court below demonstrates, beyond argument, that the trial justice did not abuse his wide discretion by requiring petitioners to either proceed to trial on June 15th, 1978, or have their complaint dismissed with prejudice. On that day, the court stated, reminding petitioners that they had once before defaulted upon the trial of the action:

> ". . . I reopened it and gave you a chance and told you what were the reasonable conditions, the reasonable conditions which apparently have not been fulfilled *and the delay in the case is solely the fault of your clients.*" (p. 53, June 15, 1978). (Emphasis added.)

The lengths to which petitioners went in this matter to avoid a trial almost defies belief. The case was on the calendar *for trial* on at least seven separate occasions starting in September 1976 and ending June 15, 1978. Each time the matter was to be called for trial, the petitioners either took dilatory action shortly before the trial date to prevent that trial, including the bringing of two proceedings against the trial justice under

Article 78 of the New York Civil Practice Law and Rules, or actually appeared on the call of the calendar but always solely for the purpose of obtaining an adjournment. They were never ready for trial and never intended to be ready for or actually go to trial.

On May 9, 1977, the petitioners, for the first time, sought an adjournment based upon Edwina Rager's purported ill health. On June 15, 1977, after opening the petitioners' default of May 9th, the trial justice agreed to adjourn the trial for a period of more than four months because of Mrs. Rager's purported physical condition, requiring her, as a condition of that adjournment, to pay into the trial court (not to respondents) certain sums for the use and occupation of the premises. Mrs. Rager flagrantly disregarded the court order, but nevertheless, still received not four, *but twelve months' adjournment of the trial*, a time period more than adequate for her recovery by her own doctor's statements.[5] Yet on June 15th, 1978, one year later, Mrs. Rager's attorney appeared, solely for the purpose of again obtaining an adjournment, based upon Mrs. Rager's purported ill health. As in each instance before, when adjournments had been requested based upon Mrs. Rager's ill health, she was not hospitalized or confined to her home. She was fully ambulatory and able to come to court. In spite of those facts, on June 15, 1978, the court offered to have her testimony taken by oral deposition. Moreover, when an extended adjournment had been granted in June 1977, Mrs. Rager totally failed to abide by the conditions for that adjournment imposed by the court. It is hard to conceive of a situation where a trial justice acted more reasonably than in the instant matter, particularly where, as here, it was so patently obvious that petitioners' sole purpose was to avoid trial at any

5. In May 1979, Mrs. Rager had submitted a letter from a doctor stating that she had suffered a "cerebral infarction" and should not be permitted to go to trial for at least six months. In June 1978, more than a year later, she submitted a letter from a doctor on the same grounds stating she should not go to trial for another four months (20a-22a, June 12, 1978, App. P).

cost. Mr. Justice Evans was aware of the fact that Mrs. Rager was living at the premises, without payment of rent, of real property taxes or of the amounts due under the first and second mortgages covering the premises. Yet he granted to her adjournments totalling nearly one and one half years based upon the flimsiest of excuses. Petitioners' counsel came to court on June 15, 1978, fully aware that the matter was to be tried, but were still not ready to go to trial, hoping to get yet another adjournment. Thus, petitioners' contentions that Mr. Justice Evans failed to grant to them a reasonable adjournment and that their rights to due process have been violated are ludicrous.

Moreover, petitioners' contentions find no basis in New York law. A case directly on point is *Miller, et al. v. Hainzl, et al.*, 5 App. Div. 2d 764 (1st Dept. 1958), in which the court, in reversing the lower court's order opening plaintiff's default, stated as follows:

> "On that date [the trial date], counsel for plaintiff applied for an adjournment [from February 8, 1957] to April, 1957 on the ground that plaintiff's father . . . had suffered two heart attacks since December, 1956 and it was essential that plaintiff's mother, who was to be a witness, accompany the father to Florida for his health. The Justice presiding . . . while refusing to grant the delay, obtained an agreement from counsel to take the mother's deposition before her departure to Florida. Accordingly, the trial was adjourned to February 14. On the latter date, plaintiff's attorney again requested an adjournment because the mother had departed for Florida, her deposition had not been taken, it was averred because the father's physician advised that the father's condition would be adversely affected by the mother's participation in the lawsuit. Upon counsel's rejection of the Court's proffer of an

adjournment for two or three more days, defendant's motion to dismiss was granted. Four months later in June, 1957, plaintiff moved to restore the case to the calendar. The order granting that motion is subject to this appeal. *While a court has discretionary power to open defaults in the furtherance of justice, that discretion is not properly exercised in a case where a default is deliberate. The facts demonstrate that the plaintiff took the calculated risk of dismissal after every reasonable opportunity was given to him to proceed with the trial.* We are not satisfied that the deposition of the mother could not have been taken, with all due regard to the health of the father before the witness left the jurisdiction. In the circumstances of this case, the Court should not have exercised its discretion to open the default." (Emphasis added.) *Id.* at 764-765.

The documented activities of petitioners in this matter demonstrate that their sole purpose throughout the entire case was to prevent the trial of this action. Many adjournments were granted to petitioners over much larger periods of time than those in the *Miller* case, *supra.* In fact, as in the *Miller* case, when the trial court was advised of Mrs. Rager's ill health, it offered to accept her testimony by deposition (4a, June 12, 1978, Appendix C).

Petitioners had many meaningful opportunities to try their case. Their request for an adjournment and refusal to proceed to trial on June 15, 1978, on the grounds stated to the trial justice, did not constitute a legal excuse, in the absence of which the trial court's dismissal was just and proper. *Link v. Wabash Railroad Company*, 370 U.S. 626 (1962); *Centerville Creamery Co., Inc. v. Wexler*, 262 App. Div. 1055 (3rd Dept. 1941).

As the Court of Appeals for the 10th Circuit has stated, "[T]here is no precise rule as to what circumstances justify a dismissal for failure to prosecute. Instead, the procedural history of each case must be examined to make such a determination." *Securities and Exchange Commission v. Power Resources Corp.*, 495 F.2d 297, 298 (10th Cir. 1974). Certainly the record in this case lends abundant support to Mr. Justice Evans' determination, as affirmed by the Appellate Division, that petitioners' request for adjournment was merely another in a three year-long series of dilatory tactics. In light of the fact that petitioner Edwina Rager had consistently appeared in court and seemed fully ambulatory, that she had been previously given a twelve month adjournment which, by her own Doctor's statements was more than adequate for her recovery, that she refused the trial justice's offer to have her testimony taken at her home, and that whatever medical opinions she offered to the court on June 15th were merely in the form of letters, Mr. Justice Evans certainly did not deprive petitioners of due process of law by dismissing their complaint on the merits. "In the situation presented, the judge in ordering the dismissal might reasonably have concluded that the plaintiff's default of appearance was not caused by illness but was an unduly belated maneuver to obtain yet another postponement." *Edmond v. Moore*, 253 F.2d at 144, *supra; Hooper v. Chrysler Motors Corporation*, 325 F.2d 321 (5th Cir. 1964), *cert. denied*, 377 U.S. 967 (1964). There is clearly no basis presented here for granting the writ based upon a purported violation of petitioners' right to due process of law.

II.

Petitioners' claim of denial of due process of law based on the trial justice's alleged bias and prejudice is groundless.

As noted in Point I of this brief, all that is required to satisfy procedural due process is the giving of proper and adequate notice and a meaningful opportunity to be heard. *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). In *Stump v. Bennett*, 398 F.2d 111 (8th Cir. 1968), *cert. denied*, 393 U.S. 1001 (1969), the court explained the role of the federal judiciary in enforcing, as to the States, the due process clause of the Constitution:

> "The due process clause permits a State a wide birth in developing rules of procedure and evidence . . . a constitutional violation cannot rest upon our independent judgment or personal appraisal of what seems the fairer or the better procedure . . . the fundamental bases of 'due process' relates to adequate notice and reasonable opportunity to be heard . . . beyond these minimal standards only oppressive and arbitrary state procedural rules command federal review. Federal intervention is justified only when the State law 'offends some principal of justice so noted in the traditions and conscience of our people as to be ranked as fundamental', *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934) or frustrates a right 'implicit in the concept of ordered liberty'. *Palco v. State of Connecticut*, 320 U.S. 319, 329, 58 S. Ct. 149, 82 L. Ed. 288 (1937). (Except as noted, citations omitted.)" 398 F.2d at pp. 113-114.

Accordingly, the only question presented to this Court by the petition in the instant case is whether or not the procedures

adopted by the New York Legislature and courts with respect to an alleged bias or prejudice of a trial justice violate the traditional notions of due process. It is respectfully submitted that they do not. New York Judiciary Law, §14 (McKinney) limits the sole grounds upon which a judge must be *disqualified* to those cases in which:

> "He is a party, or in which he has been attorney or counsel, or in which he is interested, or . . . he is related by consanguinity or affinity to any party to the controversy within the sixth degree."

It is therefore clear that Mr. Justice Evans was not required to disqualify himself in the case at bar because no charge within the purview of §14 was made against him at any time. Under New York case law, a judgment rendered by a "biased" or "prejudiced" judge — as opposed to one who is personally interested in the outcome of the case — will, nevertheless, be sustained unless it is demonstrated that such judgment was brought about by the bias or prejudice and therefore was not based upon the facts of the case. *Matter of Rotwein,* 291 N.Y. 116 (1934); *Board of Education v. Pisa,* 55 App. Div. 2d 128 (4th Dept. 1976). These rules are well within the limits prescribed by the due process clause because they do not alter the basic concept that a litigant is entitled to a meaningful, fair opportunity to be heard. If a judge comes within the purview of New York Judiciary Law, §14, he is automatically disqualified and may not sit on the case. Any judgment rendered by such a judge would be invalid. On the other hand, if he is "biased" or "prejudiced" against a defendant, his judgment may still be fair and impartial, if it is rendered solely on the facts of the case. *See Stump v. Bennett,* 398 F.2d 111 (8th Cir. 1968). In the case at bar, there is no indication of any kind that Mr. Justice Evans dismissed petitioners' complaint for any reason other than the fact that they refused to go to trial on June 15, 1978, although the matter had been adjourned many times before.

Moreover, the petitioners have totally failed to show any bias or prejudice whatsoever on the part of Mr. Justice Evans. They have done no more than point to a series of adverse rulings made by the trial justice during the course of the litigation. As a matter of law, adverse rulings do not demonstrate bias or prejudice. 28 U.S.C. §144; *United States v. Grinnell Corp.,* 384 U.S. 563, 583 (1966); *Berger v. United States,* 255 U.S. 22, 31 (1920). In *United States v. Grinnell Corp.,* 384 U.S. 563, 583 (1966), this Court stated as follows:

> "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."

In *Berger v. United States,* 225 U.S. 22, 31 (1920) this Court, referring to *In Ex Parte American Steel Barrel Co.,* 230 U.S. at p. 35 (1913), stated as follows:

> "This case establishes that the *bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case."* (Emphasis added.)

United States v. Haldeman, 559 F. 2d 31 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 933 (1977); *United States v. Bennett,* 535 F. 2d 160 (2nd Cir. 1976), *cert. denied,* 430 U.S. 906 (1977), *rehearing denied,* 430 U.S. 976 (1977); *United States v. English,* 501 F. 2d 1254 (7th Cir. 1974), *cert. denied,* 419 U.S. 1114 (1974); *see Board of Education v. Pisa,* 55 App. Div. 2d 128, 136 (4th Dept. 1976).

As noted, petitioners have failed to state a single instance in which the trial justice evidenced any prejudice or bias whatsoever, except to point to his adverse rulings. While these rulings, carefully enumerated in petitioners' brief, effectively

illustrate the weakness of petitioners' case in the trial court, under both New York and federal law, they cannot serve as grounds for a finding of bias on the part of the trial justice. In desperation, petitioners call this Court's attention to a telegram sent to Mr. Justice Evans by Mr. Rager on January 5, 1977, as a so-called "extra judicial" source of the trial justice's so-called bias. But by petitioners' own admission, that telegram was "rambling" and "disjointed" (Petitioners' Brief, pp. 21, 47). Given the circumstances of its authorship and its contents and the fact that petitioners' brief does not even state that the trial justice read that telegram, it is incredible that they would claim that such trivia could or would impair Mr. Justice Evans' ability to render a fair and impartial judgment. Petitioners concede that they did not deem it necessary to move for Mr. Justice Evans' disqualification upon his receipt of Mr. Rager's telegram (Petitioners' Brief, p. 21). It was only after Mr. Justice Evans handed down the series of adverse rulings that petitioners suddenly claimed bias on his part because of the telegram. However, such sophistry does not alter the fact that these petitioners are claiming bias based on rulings of the court adverse to them, all reviewable on appeal.

It is respectfully submitted that, as a matter of law, petitioners have totally failed under either state or federal law to show a bias or prejudice on the part of the trial justice in this case which effectively deprived them of due process of law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — TRANSCRIPT, JANUARY 17, 1977, pp. 8-11

* * *

THE COURT: In other words, I take it that you are not requesting me at this time to consolidate number three with action —

MR. NUSSBAUM: I am not requesting at this time for the specific reason that having seen the proposed order that I definitely do not want to have any order of consolidation entered into in this [9] case in the form in which Your Honor has prepared it.

I may say to Your Honor for the record this; when Number One Action and Action Two were consolidated on consent of the defendant, they stipulated that the title of the action shall be exactly as the plaintiff's complaint is. Namely, Inspiration Enterprises vs. Inland Credit Corporation, etc. Now all of a sudden when this final action came in the whole procedure is turned around.

We are the defendant. We don't have the right to open, and close last and it places us with a distinct disadvantage before the Court.

We had started this action before they filed. I filed the complaint in the Supreme Court, Your Honor, on a lis pendens filed in this court before they served their petition to dispossess us. Why are we deprived of our right to open and close before the jury? That is the purport of Your Honor's proposed order. I definitely will not consent to [10] that. It will deprive the plaintiffs of their right to a fundamental right to a fair trial of the issues in this action.

THE COURT: It seems to me, Mr. Nussbaum, I had been

advised that the summary proceeding had been first commenced and then you brought an action.

MR. NUSSBAUM: No, sir. The record will show that I filed a complaint in the lis pendens before the Supreme Court before the service of the summary proceeding.

THE COURT: Which action?

MR. ABELSON: May I say this, Your Honor. First of all I really can't answer the question because we were not the attorneys at the time all their proceedings came up, and I don't have the date.

Secondly, Mr. Nussbaum continuously talks of "I think that matter is still pending before Your Honor" and I don't know that there will be a jury here.

[11] THE COURT: Since it's not a jury trial, the plaintiffs still have the right to open and close.

MR. ABELSON: I will give him the right to open and close right now. Just as I consented to the consolidation he may have the right to open and close.

MR. NUSSBAUM: Three months ago he consented to consolidation yet he burdened this court and the Court of Appeals by withdrawing that consent.

THE COURT: There are two matters before me; Numbers One and Two. They have been consolidated. Those are the only matters before me at this time.

Mr. Nussbaum said that he does not want me to consolidate the Suffolk County action. The other motion will be decided by tomorrow. I will therefore set this matter down for tomorrow morning for a further proceeding, possibly for trial.

* * *

APPENDIX B — TRANSCRIPT, JANUARY 18, 1977, p. 48

THE COURT: The case is set down for the 21st of January for trial.

MR. ABELSON: Thank you, Your Honor.

* * *

CERTIFIED TO BE A TRUE AND CORRECT TRANSCRIPT OF THIS PROCEEDING

s/ Acquilla M. Davis
ACQUILLA M. DAVIS, CSR
Official Court Reporter

APPENDIX C — TRANSCRIPT, MAY 9, 1977, pp. 7-8

* * *

And lastly, with respect to the appeal before the Appellate Division, the Appellate Division has not seen fit to grant the stay and no application, to my knowledge, has recently been made for a stay.

THE COURT: Has any application been made for a stay?

[8] MR. MEEHAN: No, sir.

MR. NUSSBAUM: No, Your Honor.

* * *

APPENDIX D — TRANSCRIPT, MAY 9, 1977, pp. 4-6

MR. MEEHAN: * * *

With respect to the health of Mrs. Rager, I have a copy of an affidavit of Dr. Robert Wallis, M.D., and I have copies for Your Honor. Let the record indicate that I provided Mr. Abelson with a copy.

Mrs. Rager is in court and she is prepared to submit to any questions that Your Honor may have; and also, if Your Honor sees fit, she is prepared to undergo any medical examination you may deem advisable.

THE COURT: Mark this for identification.

(Document received and marked for identification as Plaintiff's Exhibit 1.)

MR. MEEHAN: As I understand it, Your Honor, the essence of this affidavit is to the effect [5] that Mrs. Rager has suffered a mild paralytic stroke.

THE COURT: It looks more like low back pain to me.

MR. MEEHAN: I beg your pardon?

THE COURT: It looks like low back pain to me.

MR. MEEHAN: I am not a qualified medical man, this is what she complains to me of and this is what she reports in the affidavit.

THE COURT: Is she in court today?

MR. MEEHAN: She is; and the record indicates on the basis of the affidavit here, she cannot sit for a long period of

Appendix D

time and she is in a position where she is essentially incapacitated; and on that basis, on the basis of the jury question, which is to be submitted, the expense or possible expense involved in having to re-litigate this case in the event of reversal by the Appellate Division, and in view of the transcripts which is the least serious basis for the application at this particular [6] time, I respectfully request and renew my application for an adjournment of this matter until such time as the Court may deem fit under these circumstances.

* * *

APPENDIX E — TRANSCRIPT, MAY 9, 1977, p. 18

MR. NUSSBAUM: * * *

I have appeared for him and I still technically and officially appear for him as counsel because I have not been officially relieved as counsel. It appears from the communications from Mr. Rager to the Court and to me and Mr. Meehan that he regards himself as representing himself. He does not regard us as representing him but nevertheless, as attorneys of record in this matter, not having been relieved, Your Honor, I think it is my duty, Your Honor, both to Mr. Rager and to the Court and to my function as an attorney, Your Honor, to present to Your Honor this statement entitled "Application to Place Case on General Calendar for An Adjournment for at Least Seven Months" on behalf of Mr. Rager. I have not read the statement, Your Honor; I have had no opportunity to read it, it was presented to me this morning but in view of the circumstances that I have stated here for the record, I now ask Your Honor to receive this.

APPENDIX F — TRANSCRIPT, MAY 9, 1977, p. 55

THE COURT: * * *

The Court hereby grants the motion of the Petitioner, Inland Credit Corporation and orders the issuance of a final judgment and orders that a warrant issue.

The respondent, Edwina Rager, may have ten day's stay.

MR. ABELSON: Thank you, Your Honor.

* * *

APPENDIX G — TRANSCRIPT, JUNE 15, 1977, pp. 2-5

THE COURT: Now gentlemen, I'm going to order this case since it is a summary proceeding in substance be tried expeditiously. Therefore, I will grant the adjournment provided that the Rager or Inspiration Enterprises or Edward Rager or anyone else pay into the court the sum of $3,623 per month. That's to commence on Monday morning on June 20th, if you want the adjournment of this case. If that is paid and the payments are made every month, on the 20th of the month to the Clerk of the court in that amount, then I will adjourn the case until as you requested Mr. Nussbaum to October 15th.

MR. MEAHAN: I requested it. I take it that's over the objection of counsel for the Inland Credit Corporation; $3,623 payable to the Clerk of the court.

THE COURT: On Monday, June 20th.

MR. MEAHAN: And each successive day of the month?

THE COURT: If that is done on Monday June 20th, the case will be adjourned to October 15th, with the right, however, of Inland Credit Corporation [3] to move for an earlier trial in the event the monies are not paid in on a monthly basis.

On the other hand, if that is done, then while some prejudice is to Inland Credit, but not much. If that is done as I told you earlier today, the case will be tried in October. Both cases will be tried. I will allow you to try the jury case in summary proceeding first. If, on the other hand, the money is not put in the adjournment is not granted. The case will go to trial on Monday June 20th. You still can go ahead with the jury if you wish. We will try the jury issue first. If, on the other hand, you are unable to proceed with the jury issue because you say that Mrs. Rager was unable to be here; she may be your chief

witness. You told me you have some fifteen or so other witnesses is that right, Mr. Nussbaum?

MR. NUSSBAUM: Yes.

THE COURT: We will then proceed with the non-jury issue. I think its called action number one, and take that before the Court and I will give you time to have your witnesses in or out because the [4] court trial, we are a little more flexable.

If Mrs. Rager cannot come to court with her testimony the Court will be prepared to go wherever she is, in bed, home or hospital and take the testimony there. That's an inconvenience to the Court but I think it would be fair to the parties. I will let you make that determination. The jury trial if she is prepared to go ahead and non-jury if she doesn't want to come to court and adjournment on a monthly basis, month by month up to October 15th so long as she or some money is put up and paid to the Clerk of the court. I granted your motion in that manner.

MR. MEAHAN: To the extent your Honor did not grant our motion as I indicated this morning. An exception was taken. I respectfully —

THE COURT: In what respect?

MR. MEAHAN: Number one, the bearer and reasonable occupancy involved. Number two, with respect to this afternoon, the numbers that were put forth by your Honor and considerations that I urged in your Honor considering a different treatment [5] of the equities in this particular situation.

THE COURT: That's the order of the Court, gentlemen.

MR. MEAHAN: Also the physical conditions.

MR. ABELSON: I am most anxious that this case go to trial. I am most anxious that there be no hitches such as there has been in the past. I am prepared with the permission of the Court who I think has made a perfectly sound decision here none the less, to waive the interest on the second mortgage of the $1,650 and I am willing to accept $2,000 for the adjournment.

THE COURT: Put up $2,000.

MR. ABELSON: $2,000; which is for the first mortgage and the taxes.

THE COURT: The order will be amended to provide for that. $2,000 payable on Monday June 20th, and every 20th of each month thereafter.

MR. ABELSON: I don't know how I can be more reasonable.

_____

J.S.C.

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT.

s/ Thomas Michiarico

APPENDIX H — TRANSCRIPT, JUNE 12, 1978, p. 4

* * *

THE COURT: Is she confined to the hospital or the home?

MR. NUSSBAUM: No, your Honor, but I am informed that she has suffered a recurring paralysis of the condition, if your Honor please, that was made to the Court in a certificate which I respectfully request permission to read into the record.

* * *

APPENDIX I — TRANSCRIPT, JUNE 15, 1978, p. 16

THE COURT: You told me yesterday that she couldn't get around because she was incapacitated.

MR. NUSSBAUM: I didn't say that. She was not hospitalized. She was not bedridden. I said to go to trial in this case, your Honor, would subject her to serious emotional injury which would worsen the paralytic condition which she is suffering from and she is now undergoing treatment. As a matter of fact, today she told me that she arranged for treatment and observation. She is ambulatory, your Honor. I never said otherwise. I never indicated otherwise.

* * *

APPENDIX J — TRANSCRIPT, JUNE 12, 1978, p. 6

* * *

THE COURT: I am not going to delay, Mr. Nussbaum. The case is old enough. If you wish to have her testimony taken by deposition and brought here, that you may do. I will give you oral permission to do that, if you want to do that. If you want to do that in her case, her testimony by deposition. She may die and you won't have her testimony at all.

MR. NUSSBAUM: Your Honor, may I consult with her before your Honor puts this down?

THE COURT: No. We have a specific date.

* * *

APPENDIX K — TRANSCRIPT, JUNE 12, 1978, p. 8

* * *

THE COURT: You are a very good trial lawyer, Mr. Nussbaum.

MR. NUSSBAUM: Your Honor, I have had no experience. The woman's life depends on this case, your Honor. This is a matter of life and death to these people.

THE COURT: I am setting it down, gentlemen, for June 19, ten o'clock, to proceed with all the witnesses you have. If you need a little more time for Mrs. Rager's testimony, I may grant it then or you can take her testimony by deposition. If you have any other witnesses you can proceed with them. Gentleman, ten o'clock Monday morning for trial.

* * *

APPENDIX L – TRANSCRIPT, JUNE 15, 1978, p. 17

* * *

THE COURT: I will hear Mr. Schleimer.

MR. SCHLEIMER: My problem, sir, in trying this case is one of literal and physical impossibility before Labor Day and I want to commit to you, sir, as an officer of the court, that it is not a stall. My particular problem in point of time is simply this. I started last night, one, a Petition on Bond in the Third Circuit Court of Appeals —

THE COURT: I understand you are busy, but I don't want the details.

* * *

APPENDIX M — TRANSCRIPT, JUNE 15, 1978, pp. 16-17

* * *

MR. SCHLEIMER: Mr. Nussbaum advised me yesterday after I was retained that he has as yet not received the return of the examinations before trial which he has been trying to get since January of 1977, together with insertions of information that was not available at the depositions and by agreement were to be inserted, added to the examinations and returned. I understand —

MR. ABELSON: First of all, your Honor, I [17] have returned two signed depositions this morning. I will stipulate to supply whatever information is necessary that the Court feels is relevant. Mr. Greenstein is coming in on the third deposition this morning. Although how necessary that is, I don't know.

I would like to make a statement to this Court that —

* * *

APPENDIX N — TRANSCRIPT, JUNE 15, 1978, p. 26

* * *

THE COURT: When were the EBTs taken?

MR. NUSSBAUM: On January 10, 1977. In that connection, your Honor —

THE COURT: Excuse me. January 10, 1977. Have you made any application to the court to get the answers to the 13 unanswered questions?

MR. NUSSBAUM: Your Honor, I sent this letter to Mr. Abelson demanding the return —

THE COURT: Have you made any application to the court?

MR. NUSSBAUM: No, because on May 9, 1977, this matter appeared before your Honor. Your

APPENDIX O — TRANSCRIPT, JUNE 15, 1978, p. 51

* * *

THE COURT: I am granting the motion to dismiss the equity case on the merits and I am going to sever the Civil Court proceeding and send it back to the Civil Court for trial.

MR. NUSSBAUM: Did your Honor say on the merits?

THE COURT: On the merits.

MR. NUSSBAUM: Without a trial?

THE COURT: I have given you opportunities of trial and you are not ready. I said on the merits.

* * *

APPENDIX P — TRANSCRIPT, JUNE 12, 1978, pp. 3-6

* * *

MR. NUSSBAUM: Thank you, your Honor.

May it please the Court. I have received on Friday a copy of a medical certificate signed by Dr. A. Georg Fleischer of the New York University Medical Center, Institute of Rehabilitation Medicine, Dr. Rusk's institute, of 400 East 34th Street, New York, dated June 7, 1978. May I read this into the record, your Honor?

THE COURT: Yes.

MR. NUSSBAUM: "To Whom it May Concern: Re: Mrs. Edwina Rager. Mrs. Edwina Rager has been under my care for rehabilitation medicine for the last several months. The present working diagnosis is transient ischemic attacks due to faulty blood circulation affecting the right side of her body. Her family physician, Dr. Wallace, and neurologist Dr. Jerome Block, and I are investigating the etiology of these attacks.

[4] At the present time, she is undergoing extensive medical evaluation procedures and since I feel that these attacks can be preceded by tension or anxiety, I do not feel that she can participate in any physical or mental strenuous activities for a minimum of four months. Sincerely yours, A. Georg Fleischer, M.D."

THE COURT: Is she confined to the hospital or the home?

MR. NUSSBAUM: No, your Honor, but I am informed that she has suffered a recurring paralysis of the condition, if your Honor please, that was made to the Court in a certificate which I respectfully request permission to read into the record.

THE COURT: Prior to this?

MR. NUSSBAUM: Prior to this, your Honor. On May 23, 1977, Dr. C. Pinckney Deal, Jr., 660 Park Avenue, New York, N.Y. May 23, 1977. "To Whom it May Concern: Re: Edwina Rager. I have examined the above patient on this date. She gives a history of having had a left sided [5] cerebral infarction in February, 1977, following an emotional shock after receiving some bad news. She did not consult a physician at that time, but she did consult a physiotherapist, and today has gained back probably 75 per cent of the function of the right upper and lower extremities.

Examination today reveals the lady to be hypertensive, and to have the residual weaknesses of a left cerebral infarction: e.g. a partial left facial (VII) and hypoglossal (XII), nerve paresis and a partial motor paresis of the right arm and leg.

Although this patient is now under therapy, it is my feeling, particularly since the initial episode was brought on by an emotional shock, and presumably therefore, by a rise in blood pressure, that she should not undergo a protracted trial at this time.

Ideally, this should be postponed at least until six months after the initial infarction, and/or her blood pressure is under strict control. Sincerely yours, C. Pinckney Deal, M.D."

THE COURT: That was a little over a year [6] ago.

MR. NUSSBAUM: Yes, sir.

If your Honor please, I submit that the prognosis of Dr. Deal that he made in this letter that I read to you, that since that time she does suffer recurrent paralysis. I am just afraid, your Honor, that the tension of the trial may produce a serious danger to her.

Appendix P

THE COURT: I am not going to delay, Mr. Nussbaum. The case is old enough. If you wish to have her testimony taken by deposition and brought here, that you may do. I will give you oral permission to do that, If you want to do that. If you want to do that in her case, her testimony by deposition. She may die and you won't have her testimony at all.

MR. NUSSBAUM: Your Honor, may I consult with her before your Honor puts this down?

THE COURT: No. We have a specific date.

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